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October 4, 2004

VIA HAND DELIVERY

RECEIVED

OCT - 4 2004

Federal Communications Commission
Office of Secretary

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: PUBLIC VERSION OF FILING OF MOMENTUM'S INC. REDACTED – FOR PUBLIC INSPECTION CC DOCKET NO. 01-338 & WC DOCKET NO. 04-313

Dear Ms. Dortch:

On behalf of Momentum Telecom, Inc., and pursuant to the Protective Order in the above referenced dockets, enclosed please find two (2) copies of the Redacted Confidential filing and the copy of the Confidential filing in the above referenced proceedings.

If you have any questions, please feel free to contact the undersigned counsel at (202) 857-4479.

Sincerely yours,

Ross A. Buntrock

Ross A. Buntrock

Counsel to Momentum Telecom, Inc.

Enclosures

No. of Copies rec'd 0+1
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	WC Docket No. 04-313
Unbundled Access to Network Elements	)	
	)	CC Docket No. 01-338
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	

COMMENTS OF MOMENTUM TELECOM, INC.

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COMMENTS OF MOMENTUM TELECOM, INC.

I. INTRODUCTION AND SUMMARY

Momentum Telecom, Inc. ("Momentum"), through counsel, hereby submits its initial comments in the above-captioned proceeding. Momentum is a Birmingham, Alabama-based competitive local exchange carrier ("CLEC") that provides local telephone, long distance and data service to over 150,000 consumers, primarily residential, in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Since its inception in 1999, Momentum has invested millions in operations support systems and related infrastructure to achieve its goal of providing high quality telecommunications services to underserved residential consumers.

Momentum utilizes unbundled local switching ("ULS") in the combination known as the Unbundled Network Element Platform ("UNE Platform" or "UNE-P") to establish a broad competitive footprint and provide conventional voice services ("POTS") bundled with long distance and enhanced services to residential customers. Momentum's market experience has repeatedly demonstrated that achieving broad competition for the residential telecommunications customers requires access to a full complement of unbundled network elements, including local

switching. But for UNE-P, there would exist for residential end users no alternative to the local telecommunications services provided by BellSouth in its nine state territory.

Indeed, eight years of market experience unequivocally proves the competition in residential telecommunications services market simply will not occur without UNE-P. The reason for this is straightforward: BellSouth's local exchange network continues to maintain a natural monopoly position in the local telecommunications services market for residential customers. UNE-P is the only market entry strategy that has yielded demonstrable success in the residential market for local telecommunications services. Indeed, nearly 100% of all residential telecommunications customers in the BellSouth territory are provided service via UNE-P.

For all of these reasons, as well as for additional economic and operational reasons, this Commission consistently has recognized acute impairment in the mass market, which obviously includes as a subpart the residential market. Accordingly, despite Chairman Powell's open and notorious hostility,[1] the Commission has required BOCs to provide UNE-P. The Commission's findings regarding impairment in the mass market are just as true as they were in 2003, and the impairments faced by competitors serving the residential local telecommunications service market are even more extreme. A UNE-P based local entry strategy has proven successful because it addresses each of the most critical impairments that would otherwise frustrate entrants seeking to offer service to residential consumers.

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[1] According to Chairman Powell "no one significant will be competing using unbundled network elements"; instead, "there is going to be more competition, it's going to be better than what we had before, and I'll even go so far as to say: this isn't a prediction, it's a promise." See 15 June 2004 Gartner Fellows Interview with Michael Powell http://www4.gartner.com/research/fellows/asset_91308_1176.jsp); Mark Wigfield, *FCC to Begin Work on Interim Phone Rules*, DOW JONES NEWSWIRES (10 June 2004).

II. COMPETITION IN THE RESIDENTIAL LOCAL TELECOMMUNICATIONS MARKET EXISTS ONLY BECAUSE OF UNE-P

Congress enacted the Telecommunications Act of 1996 with the goal of bringing competition to the all telecommunications markets, including the residential local telecommunications services market. That is, the 1996 Act embraced a competitively-neutral philosophy that treats all entry strategies equally, with the view that market forces should guide the deployment of investment and the sequence of competitive expansion. The ILECs argue that UNE-P should not be made available in any event because the offering of UNE-P discourages entrants from deploying their own switches. In effect they claim that UNE-P based entry occurs at the expense of UNE-L entry. The fact of the matter is, however, no facilities based competitors provide local telecommunications services to more than a de minimis number of residential consumers.

But the fanciful notion that "*If you build it, they will come*" is inapposite to the creation of a robust competitive residential local telephone market. In fact, such field-of-dream notions have been rejected by the Supreme Court, which recognized that the cost of building a duplicate network is not only prohibitively expensive, but wasteful. Indeed, in *Verizon Communications, Inc. v. FCC*, the Supreme Court concluded that duplication of costly bottleneck elements is "neither likely nor desired" in the competitive market envisioned by the Act.[2] The Supreme Court further concluded that competitors are likely to deploy facilities without any regulatory prompting wherever it is sensible on account of "the desirability of independence from

[2] *Verizon v. FCC*, 122 S.Ct. 1646 (2002) ("*Verizon*").

an incumbents' management and maintenance of network elements."[3] Any other approach is doomed to failure.

The first step in bringing alternative ubiquitous local telecommunications service to the residential market that relies upon competitive facilities is to maintain UNE-P until such time as the economic and operational impairments inherent in the ILECs local exchange bottleneck can be eliminated. Mechanisms comparable to UNE-P have already brought competition in bringing residential customers electricity and natural gas. Residential telephone customers deserve the same. To preserve the Congressional objective of local telephone competition, the Commission must continue to allow competitors access to UNE-P to serve residential consumers.

The residential market for local telecommunications services without question is a separate and distinct market for purposes of impairment analysis. The industry always has treated residential and business customers separately from a product, marketing, and pricing standpoint. Indeed, the Bell Companies and others maintain separate portals on their web sites for residential and business customers. Furthermore, this Commission and state commissions similarly have consistently established separate consumer protection frameworks for business and residential consumers. Nothing forecloses the Commission from evaluating the residential market distinctly from business market, and indeed, such market segmentation for impairment analysis is compelled by the industries' consistently separate treatment of residential and business subscribers.

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[3] Id., 1670.

III. COMPETITORS SERVING THE RESIDENTIAL MARKET ARE IMPAIRED WITHOUT ACCESS TO UNE-P

A. The TRO Reached a National Finding of Impairment For the Residential Market That Need Not Be Revised As A Result of *USTA II*

In its *Triennial Review Order* ("*TRO*" or "*Triennial Review Order*"),[4] the Federal Communications Commission ("FCC") made a national finding "that requesting carriers are impaired without access to unbundled local circuit switching when serving mass market customers,"[5] which clearly include residential customers. In making that impairment finding, the Commission expressly found that "[i]nherent difficulties arise from the incumbent LEC hot cut process for transferring DS0 loops, typically used to serve mass market customers, to competing carriers' switches."[6]

The Commission identified "increased costs due to non-recurring charges and high customer churn rates, service disruptions, and incumbent LECs' inability to handle a sufficient volume of hot cuts" as some of the primary impairments faced by competitors serving the mass market.[7] The Commission also identified a number of other economic and operational barriers that impaired the ability of CLECs to provision switching to serve the mass market. With those nationally-known mass market switching barriers identified, the Commission stated that its "analysis could end with [its impairment] conclusion."[8] However, the Commission recognized that in some markets the national impairments relied upon by the FCC may possibly

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4 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003).

5 *Id.*, ¶ 419.

6 *Id.*, ¶ 422.

7 *Id.*

8 *Id.*, ¶ 423.

be less acute. Accordingly, the Commission directed the state commissions to conduct "a more granular market-by-market analysis of impairment on a going forward basis."[9]

The Commission enumerated two specific "triggers" to evaluate whether there is actual competition in a market: the "self provisioning" trigger and the "competitive wholesale facilities" trigger. The Commission concluded that the self provisioning trigger is met when the State Commission finds that three or more unaffiliated competing carriers are serving mass market customers in a particular market using their own switches.[10] The Commission concluded that the competitive wholesale facilities trigger is met when the state commission finds that competing carriers are able to obtain switching from third parties offering access to their own switches on a wholesale basis.[11] The Commission also held that non impairment could be proven if it could be demonstrated that competitors have the "potential ability" to deploy their own switches to serve a market.

On March 2, 2004, the D.C. Circuit decided *USTA II*, vacating and remanding several of the *Triennial Review Order*'s unbundling rules; the court left in place, however, the Commission's impairment test.[12] The *USTA II* court vacated as "an unlawful subdelegation of the Commission's Section 251(d)(2) responsibilities" the FCC's delegation to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular, the authority to make determinations regarding impairment for mass market local switching.[13] The *USTA II* court also vacated the Commission's national finding of impairment

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9 *Id.*, ¶ 427.
10 *Id.*, ¶ 501.
11 *Id.*, ¶ 504.
12 *USTA II*, 359 F.3d at 560.
13 Id., 566.

for mass market local switching, which the court thought to be based "solely on hot cuts"[14] without consideration of other economic or operational factors that might constitute barriers to entry. That is, the court remanded to the Commission the *application* of the *TRO* impairment in the *Triennial Review Order*, but kept intact the *definition* of impairment set forth in the *TRO*. Accordingly, the *USTA II* court did not, and does not, require the Commission to overturn its previous finding of impairment for ULS. Rather, the court simply requires the Commission on remand not reach an finding of impairment based upon an application of the definition that is "open ended."

Momentum submits that the proper application of the statutory unbundling standard set forth in Section 251 of the 1996 Act compels a finding that ULS should be made available to competitors serving the residential market. The record in this proceeding will demonstrate that under any reasonable application of the Commission's unbundling guidelines to the factual circumstances in any geographic market, CLECs serving single line residential customers face material impairment in any ILEC's footprint without access to UNE-P. Without accesses to UNE-P, CLECs will be foreclosed from providing local telecommunications services to residential consumers—a segment of the market that has been ignored by all except those utilizing UNE-P.

B. No Viable Alternative to UNE-P Exists to Provide Competition In the Residential Market

UNE-P is the only viable delivery mechanism for competitors to offer local telecommunications services to residential customers. In spite of his increasing antipathy to UNEs generally and UNE-P specifically, Chairman Powell himself has acknowledged to

[14] Id., 569.

Congress, "...even most Bells agree that UNE-P should be available for serving residential customers everywhere."[15] Key characteristics of the residential market have foreclosed – and continue to foreclose – competitors from self-provisioning switching to serve this market segment. The same operational and economic impairments identified by the Commission in 2003 continue to plague carriers seeking to serve the residential market, and nothing in the record in this proceeding, or in any of the underlying State Commission proceeding suggests otherwise.

In operational terms, in order to provide analog POTS to a customer using its own facilities, a CLEC would have to:

- Provision their own switch
- Collocate facilities with the ILEC in every wire center
- Purchase transport to backhaul their traffic from their customers back to their switch
- Rely upon the ILEC to perform hot cuts to disconnect customers from the ILEC to the CLEC's switch

No competitor has been able to overcome these operational impairments in the residential market. Indeed, even in the more lucrative business market, it remains unclear whether any CLEC will have the wherewithal to ultimately overcome existing operational impairments and reach the point of having a sustainable, profitable business based on self-provisioned switching.

From an economic perspective, the plain fact of the matter is that no competitor has been able to overcome the tremendous economy of scope and scale of ILEC switching. Such economic impairment is most acute in the residential market. The profit margins associated with serving a residential customer are paper thin, which is why the financial markets perceive the business model as too risky to justify such an investment. In fact, on July 22, 2004 five private

[15] Hon. Michael K. Powell, Chairman, FCC Letter to Hon. Fred Upton, Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce (June 15, 2001) at 8.

investment firms – Kohlberg Kravis Roberts & Co., Centennial Ventures, Columbia Capital, Madison Dearborn Partners LLC and M/C Venture Partners – that have major stakes in large facilities-based CLECs such as Time Warner Telecom, NuVox Communications, Allegiance Telecom, and XO Communications Inc., which serve the more lucrative business market, wrote to Chairman Powell urging him to recognize and halt the adverse consequences of his policies. They noted that because most CLECs "operate on thin margins in highly price sensitive markets ... they simply [can] not absorb such dramatic cost increases or pass them along to customers in the form of increased rates." As such, the expected radical "increase in the price of the embedded base of high capacity loops and transport likely would cause some (competitors) to violate loan covenants."[16]

The insurmountable combination of prohibitively high costs and customer disruption create insurmountable barriers to the creation of alternative networks to serve residential POTS customers. UNE-P is the only demonstrated method of achieving ubiquitous local competition in this important market. In the absence of UNE-P availability, CLECs wishing to serve the residential market would be forced to deploy their own facilities, proposition that is not only prohibitively expensive, but wholly impractical. There simply is no question that CLECs seeking to provide local telecommunications services to residential consumers are impaired with access to ULS and UNE-P.

[16] Letter from Peter H.O. Claudy, M/C Venture Partners; James Fleming, Columbia Captial; James N. Perry, Fr., Madison Dearborn Partners, LLC; Rand G. Lewis, Centennial Ventures; James H. Greene, Fr., Kohlberg Kravis Roberts & Co. to Chairman Powell, CC Docket Nos. 01-338, 96-98, and 98-147 (July 22, 2004).

C. UNE-L Availability Alone Will Ensure That There Is No Competition for Residential Customers

CLECs who rely on a UNE-L entry strategy are solely focused on serving higher margin business customers, and not analog residential POTS lines. Moreover, myriad UNE-L CLECs have gone out of business trying to serve business market, in spite of the fact that it is much more economically lucrative than the residential market. Nearly nine years after passage of the Act, the jury remains out on whether any of the currently surviving UNE-L providers will reach a point where their business is self-sustaining.

The ILECs argue that in the absence of UNE-P, availability of DS-1 loops will allow for competition to occur in the mass market—though not even the ILECs suggest that such competition would occur in the residential market. Cutting off access to UNE-P will kill competition in the residential market virtually overnight, despite proposals for "transition" plans by both the Commission and other competitors. There simply is nothing to "transition" to. UNE-P can be provisioned through a process that is wholly automated. Provisioning service using UNE-loops, on the other hand, requires carriers to perform a manual "hot cut" to transfer the loop from the ILEC switch to the competitor's switch.

As the Commission recognized in the *Triennial Review Order*, the hot-cut process itself is a source of impairment. The hot cut process is expensive and the process poses substantial risk of service degradation and outages. Indeed, the high cost of the hot cut process makes reliance on the process absolutely cost prohibitive in the residential market, where the profit margin is thin and customer churn is relatively high.[17] Momentum would never recover the high costs of performing hot cuts from its residential customers. The average price of a hot

[17] See attached Confidential Declaration of Alan L. Creighton.

cut in the BellSouth territory is just under $40.00, and in addition to the hot cut, a competitor also must incur a cross connect charge, which averages just under $28.00. At these rates, it would cost Momentum over $9.5 million in non-recurring charges to BellSouth to engage in a "transition" of its existing customer base off of UNE-P, a cost Momentum can never recover from the residential customers it serves with already paper-thin margins. Of course, the $9.5 million is just the tip of the iceberg, as it does not include the cost of the switches, collocations, transport, and other items. It quite literally would cost hundreds if not thousand of dollars per line to "transition" to UNE-L. And because UNE-L simply is uneconomic for residential customers over any reasonable range of scale, any such effort to transition would be doomed ultimately to failure.

D. "Intermodal" Competition from VoIP, Wireless and Cable Should be Given No Weight In the Impairment Analysis As it Relates to Residential Customers Served by UNE-P.

The *USTA II* court requires the FCC to evaluate intermodal alternatives when evaluating impairment. But the court also specifically stated that the FCC need not address how it evaluates such alternatives, or the weight such alternatives should be assigned. The court merely stated that "we reaffirm *USTA I*'s holding that the Commission cannot ignore intermodal alternatives."[18] With this legal backdrop firmly in mind, the Commission should clearly reaffirm the conclusions in the *TRO* with respect to the weight to be afforded intermodal alternatives in applying the impairment definition. None of the so called "intermodal" competitors—cable, wireless, or VoIP—are viable substitutes for analog residential POTS service.

[18] USTA II, 573-574.

1. VoIP, Wireless, and Cable Are Not Substitutes for Residential POTS Service

Although the FCC stated in the *Triennial Review Order* that the Commission could "consider" intermodal alternatives in the switching trigger analysis, it directed the Commission to review them carefully before determining whether, or if, they may legitimately meet the trigger standard. It would make little sense, therefore, to eliminate unbundled local switching (and thereby UNE-P) if the only alternative in a market was, for example, an entity that utilizes its own loops, like cable telephony providers.

The FCC emphasized this point several times in the *TRO*. The Commission stated that: "many of the [CLEC residential] lines cited by the incumbents are served by carriers that, for one reason or another, are able to use their own loops. We have made detailed findings that competitors are impaired without access to incumbents' voice-grade local loops. Indeed, no party seriously contends that competitors should be required to self-deploy voice-grade loops. Thus, for the typical entrant, entry into the mass market will likely require access to the incumbents' loops, using the UNE-L strategy. ... Indeed, as discussed above, a crucial function of the incumbent's local circuit switch is to provide a means of accessing the local loop."[19]

The Commission also noted that: "an important function of the local circuit switch is as a means of accessing the local loop. Competitive LECs can use their own switches to provide services only by gaining access to customers' loop facilities, which predominantly, if not exclusively, are provided by the incumbent LEC. Although the record indicates that competitors can deploy duplicate switches capable of serving all customer classes, without the ability to combine those switches' with customers' loops in an economic manner, competitors

[19] *Id.* at ¶ 439, emphasis supplied

remain impaired in their ability to provide service. Accordingly, it is critical to consider competing carriers' ability to have customers' loops connected to their switches in a reasonable and timely manner."[20] Clearly, the presence of intermodal competition from cable, VoIP or wireless alternative should have little, if any, bearing on the outcome of the impairment test.

It simply could not be more clear that the intermodal alternatives under consideration are not substitutes for the POTS market. The clearest demonstration of this fact is the response by the BOCs to competition from the intermodal technologies. Verizon's response to wireless competition was not to enhance its POTS service; instead it directly entered the wireless market. Likewise, Verizon perceives VoIP as a threat to a segment of its POTS market – the segment that has the means and need to purchase expensive broadband Internet access. To successfully compete against POTS providers, it offers its own VoIP service over broadband. If VoIP were actually a threat to the entire POTS market, the appropriate response by Verizon would be to buttress its POTS offerings. Instead, Verizon recognizes that it must sacrifice a segment of its POTS customers in order to head off the VoIP challenge. As Verizon and the other BOCs race to ward off the challenge of intermodal technologies to segments of the POTS market, core POTS customers remain underserved and ignored.

As captives to a monopolistic market—in which there is little active competition—POTS customers who only want a telephone are placed in the position of subsidizing the efforts of the BOCs to service more lucrative segments of the market. Aside from the empirical evidence of only partial overlap between intermodal technologies and the POTS market, as confirmed by the BOC response to intermodal challenges, there is also practical

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[20] *Id.* at ¶ 429, emphasis supplied.

evidence that intermodal technologies serve different markets from POTS. For example, although wireless services encroach on portions of the POTS market, a cell phone is no substitute for a wired phone. Wireless is a person-to-person service, whereas POTS is point-to-point. While wireless frees the individual from being tethered to a location, it is no substitute for a wired phone. As simple a task as a mother calling home to check on her children is impractical without POTS. Accordingly, while the Commission is required to consider intermodal alternatives, it is clear that they should be given little weight in the impairment analysis.

2. Consumers Should Not Be Forced to Give Up Regulatory Protections in Order to Avail Themselves of Alternative Service

Without UNE-P, residential consumers will have no competitive alternative that is subject to consumer protection regulation promulgated by the State Commissions and the FCC. State Commissions regulate wireline telecommunications services, and Title II of the Act gives this Commission authority to regulate common carriers in their provision of interstate telecommunications services. State and federal regulation of common carriers providing telecommunications services has resulted in a robust set of consumer protection provisions, including pricing, slamming and cramming regulations, truth in billing, and 911 guidelines, to name a few.

None of the so-called intermodal offerings are subject to state commission regulation or common carrier regulation under Title II of the Act. State commissions simply have no regulatory authority over wireless or over information services, such as VoIP and cable modem service. Similarly, Title II of the Act does not apply to these services. Accordingly, in order for residential consumers to avail themselves of an "intermodal" alternative – even

assuming any such option is available – consumers would have to forgo the laws and regulations designed to protect them.

The Commission must not forget that the rate payers financed the PSTN, and consumers deserve continued access to incumbent and competitive telecommunications service providers over that network. Consumers simply should not have to abandon the PSTN and hard won state and federal consumer protection rules in order to get service from someone other than the incumbent.

IV. EVEN IF THE COMMISSION FINDS 'NO IMPAIRMENT' UNDER SECTION 251(D) THE COMMISSION MUST ENSURE THAT BOCS COMPLY WITH THE INDEPENDENT REQUIREMENTS OF SECTION 271

The *TRO* correctly recognized that under the Section 271 competitive checklist, loops, transport and switching are "network elements" that must be unbundled, even if the Commission were to make a finding of 'no impairment' and those elements were no longer required to be made available under Section 251(c)(3) of the Act.[21] The Commission emphasized that "the plain language and structure of section 271(c)(2)(B) establishes that BOCs have an independent and ongoing access obligation under section 271"[22] to provide unbundled access to the following elements: (1) local loop transmission; (2) transport; (3) local switching; and (4) signaling.[23]

All BOCs must provide these network elements in order to gain in region interLATA authority, and once the Commission grants such authority, a BOC is obligated to provide continuing access to these network elements. This obligation is wholly separate and

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21 TRO, para. 654-657.
22 Id., 654.
23 See 47 U.S.C. 271(c)(2)(B)(iv)-(vi).

apart from any unbundling obligation under Section 251 of the Act. Indeed, the *USTA II* court agreed with the Commission's *TRO* findings regarding 271 unbundling, holding that the "FCC reasonably concluded that checklist for, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by Sections 251-252. In other words event in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases..."[24] While a 271 element may no longer be required to be provided pursuant to Section 251, 271 elements must be provided on terms and at rates that are just, reasonable and nondiscriminatory in accordance with sections 201 and 202 of the Act, and those rates can be set by state commissions.

A. State Commissions Have Jurisdiction Over Section 271 Elements By Incorporation of the Section 252 State Commission Review and Approval Process In Section 271

The only way for Section 271 unbundling to occur is by means of interconnection agreements that have been approved by state commissions under Section 252. State commission authority under Section 252 necessarily includes the price term. While the *USTA II* court held that section 271 elements should be priced in accordance with sections 201 and 202, the mere applicability of the just and reasonable pricing standard for Section 271 unbundling does nothing to divest state commissions of the plenary Section 252 authority that Section 271 vests in them under the clear language of the statute. Unbundling under Section 271 is accomplished by means of interconnection agreements *and* that these agreements are subject to review, approval, arbitration, interpretation and enforcement by state public service commissions under Section

[24] *USTA II*, 588.

252.[25] Indeed, Momentum recently petitioned the Alabama state commission to established a generic proceeding to establish just reasonable and nondiscriminatory pricing for UNEs.[26]

The Eleventh Circuit Court of Appeals, sitting *en banc*, recently echoed the unanimous view of the FCC and the other courts that have considered the scope of state authority over Section 271, holding that "the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance."[27] Section 252 is essential to enforcement of the 1996 Act because the pro-competition and anti-discrimination policies of the 1996 Act, as well as state law, can be enforced only through state commission review and enforcement of interconnection agreements.[28]

Any attempt to defeat state commission authority under Section 252 is a threat to telecom regulation, and has been recognized as such by the Commission.[29] The Commission properly viewed Qwest's refusal to file interconnection agreements as an alarming attack on the core mechanism for enforcing the 1996 Act, where it noted: "Requiring filing of all interconnection agreements best promotes Congress' stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements ... to ensure that such

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[25] *See* 47 U.S.C. §§ 271(c)(1)(a) and 271(c)(2)(A).

[26] *See also Re: Petition of Momentum Telecom Inc. and ITC^DeltaCom Communications Inc. to Establish a Generic Proceeding to Establish "Just, Reasonable and Nondiscriminatory" pricing for BellSouth Telecommunications Inc.'s Section 271 Unbundled Network Elements"*, Docket No. __, (Sept. 29, 2004).

[27] *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003); see also Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475, 479-80 (5th Cir.2000); MCI Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 344 (7th Cir.2000)

[28] *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d at 1278 ("interconnection agreements are the tools through which [the 1996 Act is] enforced").

[29] *See, e.g., In Re: Qwest Corp., Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, March 12, 2004 ("*Qwest NAL*") (largest proposed forfeiture in FCC history ($9 million) for Qwest's refusal to file interconnection agreements for state review and approval).

agreements do not discriminate against third parties, and are not contrary to the public interest."[30] Later, the Commission reiterated that "Section 252(a)(1) is not just a filing requirement. Compliance with Section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[31]

B. A Finding of Non-Impairment Under Section 251 And Application of the "Just and Reasonable" Pricing Standard For Section 271 Elements Does Not Divest State Commissions of Jurisdiction.

Simply because a particular element is no longer subject to Section 251 unbundling obligations and Section 251 TELRIC pricing standards, state commissions retain plenary jurisdiction over the pricing of such elements. A finding of non-impairment, and a change in the pricing standard does not alter the price dispute resolution process, or the state-federal division of responsibility for pricing in the 1996 Act or otherwise divest state commissions of their Section 252 authority. Indeed, the basic structure of cooperative federalism countenanced by the Supreme Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999), under which the FCC defines, through rulemaking, a general methodology that is actually implemented by the state commissions, is equally applicable here. State commissions have authority to review, approve, arbitrate, interpret and enforce the price term for both Section 251 and Section 271 unbundling, and are perfectly capable of applying different pricing methodologies.

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30 *Qwest NAL*, ¶ 21, *citing Local Competition Order*, 11 FCC Rcd at 15583-84, ¶ 167 (emphasis in original).

31 *Qwest NAL*, ¶ 46.

V. CONCLUSION

Consistent with the foregoing, the Commission should re-affirm that competitors are impaired without access to ULS and UNE-P in the residential market.

Respectfully submitted,

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October 4, 2004

(Redacted – For Public Inspection)
Declaration of Alan L. Creighton
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